Supreme Court, U.S.
FILED
FEB 6 1992
OFFICE OF THE CLERK

(2)

DOCKET NO. 91-1110

IN THE

Supreme Court of the United States

October Term 1991

WALLACE S. HARWOOD, JR.,

Petitioner,

v.

PARTREDEREIT af. 15.5.81.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

A. Jackson Timms
Richard T. Robol
John E. Holloway
HUNTON & WILLIAMS
1000 Crestar Bank Building
500 East Main Street
Norfolk, Virginia 23510
(804) 625-5501

Counsel for Respondent

QUESTION PRESENTED

WHETHER THE LONGSHORE HARBOR WORKERS' COMPENSATION ACT COVERS A LAND-BASED HARBOR PILOT PROVIDING TEMPORARY MARITIME SERVICES TO A VESSEL WHEN THE PILOT CONCEDES HE IS NOT A JONES ACT SEAMAN.

TABLE OF CONTENTS

		Page
I.	Statement of the Case	2
II.	Summary of Argument	5
III.	Argument	7
	A. Background	7
	B. The Fourth Circuit Decided This Case Correctly; Its Holding Does Not Conflict With Any Applicable Decision of This Court	11
	C. The Fourth Circuit's Holding Was Narrow And Fact-Specific; It is Not of National Significance .	29
IV.	Conclusion	38

TABLE OF AUTHORITIES

CASES

Page(s)

Davis v. United States,
417 U.S. 333 (1974) 35

Director, Office of Workers' Compensation Programs v. Perini N. River Assocs.,
459 U.S. 297 (1983) . . . 10, 14, 15, 16, 29, 33

Ford v. Parker,
52 F. Supp. 98 (D.Md. 1943) . . . 33

Harwood v. Partredereit,
944 F.2d 1187 (4th Cir. 1991) 3, 4, 11, 15, 16, 17, 18, 30, 31, 35

Harwood v. Partredereit,
1990 A.M.C. 1384 (E.D. Va. 1990) 4, 27

Herb's Welding v. Gray,
470 U.S. 414 (1985) 14, 15

Interlake S.S. Co. v. Neilson,
338 F.2d 879 (6th Cir. 1964),
cert. denied, 381 U.S. 934 (1965) 33

International Stevedoring Co. v. Haverty,
272 U.S. 50 (1926) 37

Levene v. Pintail Enterprises, Inc.,
943 F.2d 528 (5th Cir. 1991) . . . 33

Page(s)

McDermott Intern., Inc. v. Wilander,
___ U.S. ___, 111 S.Ct. 807 (1991) 9, 11, 14, 18, 19, 20, 22, 23, 26, 27, 28, 29, 34, 36, 37, 38

Nalco Chemical Corp. v. Shea,
419 F.2d 572 (5th Cir. 1969) . . . 33

Norton v. Warner, Co.,
321 U.S. 565 (1944) . . . 22, 23, 34

Rex Navigation and Patrol Agency, Inc. v. Collura,
329 F.Supp. 696 (E.D.N.Y. 1971) . 33

Ross v. Moffitt,
417 U.S. 600 (1974) 12

Seas Shipping v. Sieracki,
328 U.S. 85 (1946) 24, 25, 35, 37, 38

South Chicago Coal & Dock v. Bassett,
309 U.S. 251 (1940) . . . 22, 23, 27, 34, 37

Southwest Marine, Inc. v. Gizoni,
60 U.S.L.W. 4020 (Dec. 4, 1991) 20, 21

Stephenson v. McLean Contracting Co.,
863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S. Ct. 2110 (1989) 34, 35

Page(s)

Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946) 11, 18, 19, 23, 26, 27, 28, 29

Whittington v. Sewer Const. Co., 541 F.2d 427 (4th Cir. 1976) . 34, 35

STATUTES

Longshore Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 6, 8, 9 10, 24, 30

The Jones Act, 46 U.S.C. App. § 688 . . . . . 8, 9

Va. Code §§ 54.1-900 4

OTHER AUTHORITIES

G. Gilmore & C. Black, The Law of Admiralty 404-08 (2d ed. 1975) 9, 10, 25

Longshoremen's Act, Opinion No. 22, 1928 A.M.C. 263 (U.S. Employees' Compensation Commission 1927) 26

M. Sturley, Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases, 67 Tex. L. Rev. 1251, 1274 (1989) 14

Page(s)

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 222 (6th ed. 1986) 13, 25

I. Statement of the Case

This case arises out of a personal injury sustained by Wallace Harwood while employed as a harbor pilot on navigable waters. Harwood was injured while attempting to board the M/V CAPTAIN MOST, a Danish flag vessel homeported at Svendborg, Denmark. Harwood filed this action against the owner of the M/V CAPTAIN MOST[1] seeking recovery under the Jones Act and the general maritime law.

It is undisputed that Harwood was a land-based maritime worker who was injured in the course of his employment while on the navigable waters of the United States. Petition at 5, 9, 10-11; Harwood v. Partredereit, 944 F.2d 1187, 1190 (4th

---

[1]Partredereit af. 15.5.81 is organized under the laws of Denmark. It is not a parent, subsidiary or affiliate of any publicly held corporation.

Cir. 1991). In his Petition, Harwood states that he has no "permanent or even semi-permanent connection to the vessel." Petition at 10-11. He describes his employment on vessels as "occasional and shore-based." Id. Virginia pilots enjoy a statutory monopoly and their services are forced on foreign vessels by compulsion of civil and criminal penalties. See Va. Code §§ 54.1-900 to -927 (Repl. Vol. 1988 & Supp. 1990).

The district court granted the vessel owner summary judgment on Harwood's Jones Act claim. The court concluded that Harwood was not a Jones Act seaman because his "relationship to the vessel was solely temporary or transitory." Harwood v. Partredereit, 1990 A.M.C. 1384, 1385 (E.D. Va. 1990). Harwood did not appeal this ruling and has abandoned any claim of "seaman" status under the Jones Act. For

purposes of this appeal, therefore, it is established that Harwood is not a Jones Act seaman.

The case was tried on Harwood's general maritime law claims based on alleged unseaworthiness and negligence. Over the vessel owner's objection, the district court instructed the jury on Harwood's strict liability unseaworthiness theory. The court also instructed the jury on Harwood's negligence claim. The jury returned a general verdict for Harwood for $700,000. The district court denied the vessel owner's motions for a directed verdict and for judgment notwithstanding the verdict.

Because the jury was improperly instructed on Harwood's strict liability unseaworthiness theory, the Fourth Circuit reversed and remanded this case for a new trial on principles of negligence. The

Fourth Circuit held that Harwood was covered by the Longshore and Harbor Workers' Compensation Act and therefore not entitled to a warranty of seaworthiness pursuant to section 905(b). 33 U.S.C. § 905(b).

II. Summary of Argument

Harwood's request for Supreme Court review is based on two contentions: 1) The Fourth Circuit decision is incorrect; and 2) The Fourth Circuit decision has broad implications for maritime workers. Both contentions are meritless.

A. The Fourth Circuit Correctly Decided This Case.

Harwood's Petition presents no legitimate basis for Supreme Court review and Harwood's contentions are flatly contradicted by clear decisions of this Court. Nonetheless, he charges that the

Fourth Circuit holding "is a clear aberration." To the contrary, each element of the Fourth Circuit's reasoning is supported by decisions of this Court and the Courts of Appeals. Indeed, this Court recently addressed and decided these coverage issues. The Fourth Circuit's application here of the principles stated in this Court's decisions does not conflict with authority from any other Court of Appeals. Absent any conflict among the circuits, this Court should not revisit issues so recently decided.

B. **The Fourth Circuit's Holding Was Narrow and Fact Specific; It Is Not of National Significance.**

The Fourth Circuit holding does not have broad implications for maritime workers. In support of his argument, Harwood presents a novel and unprecedented interpretation of the LHWCA which, if

accepted, would dramatically reduce the number of workers covered by the LHWCA. The Fourth Circuit properly rejected Harwood's interpretation and, instead, correctly applied to the particular undisputed facts of this case well-established principles of LHWCA interpretation. The Fourth Circuit's narrow and fact specific holding does not have broad implications for maritime workers. It is not of national significance.

III. ARGUMENT

A. Background

The Jones Act, 46 U.S.C. App. § 688, and the Longshore Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, are a mutually exclusive pair of remedial statutes for maritime workers. McDermott Intern., Inc. v. Wilander, ___ U.S. ___, 111 S. Ct. 807, 817 (1991). The Jones Act

provides a negligence remedy to "seamen." 46 U.S.C. App. § 688. Vessel owners also owe Jones Act seamen a warranty of seaworthiness. The LHWCA provides uniform compensation remedies to all persons who are injured while engaged in "maritime employment" except those specifically excluded. Wilander, 111 S. Ct. at 817; G. Gilmore & C. Black, The Law of Admiralty 404-08 (2d ed. 1975). One exclusion covers "a master or member of a crew of any vessel," which excludes from coverage Jones Act seamen. Wilander, 111 S. Ct. at 813; see 33 U.S.C. § 902(3)(G). Under the LHWCA, a worker's exclusive remedy against his employer is payment of compensation benefits. 33 U.S.C. § 905(a). Though the LHWCA also provides workers a negligence remedy against third party vessel owners, the Act expressly eliminates the vessel owner's warranty of

seaworthiness to maritime workers covered by the LHWCA. 33 U.S.C. § 905(b).[2]

This Court recently explained the interaction between the LHWCA and Jones Act:

> The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of any vessel". . . ."[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute. . . . With passage of the LHWCA, Congress established a clear distinction

---

[2]In 1972, Congress amended the LHWCA. The amendments increased compensation benefits, expanded LHWCA coverage to certain workers injured ashore, eliminated the vessel owner's warranty of seaworthiness to workers covered by the LHWCA and eliminated the vessel's right to an indemnity from the worker's employer. Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 459 U.S. 297, 313 (1983); G. Gilmore & C. Black, The Law of Admiralty 411 (2d ed. 1975).

between land-based and sea-based maritime workers.

Wilander, 111 S. Ct. at 813. Thus, "seaman" under the Jones Act and "member of a crew" under the LHWCA exclusion are the same. Id. at 813-16; Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946).

The Fourth Circuit held that Harwood was engaged in "maritime employment" and was not a "master or member of a crew" excluded from LHWCA coverage. Therefore, the court held, Harwood was covered by the LHWCA and not entitled to a warranty of seaworthiness. Harwood, 944 F.2d at 1192. Because the trial court instructed the jury on Harwood's strict liability unseaworthiness claim, the Fourth Circuit reversed and remanded this case for a new trial based on principles of negligence. Harwood, 944 F.2d at 1190-193.

Harwood's petition presents various arguments for Supreme Court review. These arguments boil down to two contentions: (1) The Fourth Circuit decided this case erroneously; and (2) This case is important because the Fourth Circuit opinion has broad negative implications for the maritime industry. Both contentions are meritless and neither provides any basis for Supreme Court review. Harwood does not suggest any conflict among the circuits.

B. The Fourth Circuit Decided This Case Correctly; Its Holding Does Not Conflict With Any Applicable Decision of This Court.

The correctness or error of the decision below is generally not a basis for this Court's exercise of its discretionary jurisdiction. Ross v. Moffitt, 417 U.S. 600, 616-17 (1974) ("[t]his Court's review

. . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 222 (6th ed. 1986). Still, Harwood argues in his petition that the Fourth Circuit decision is not consistent with some authorities, including the legislative history of the LHWCA, a 1927 administrative opinion, some district court opinions and opinions of this Court. In fact, the Fourth Circuit opinion represents sound application of well established principles.

The Fourth Circuit applied this Court's recent cases defining "master or member of a crew" under the LHWCA and "seaman" under the Jones Act.[3] See McDermott

---

[3]Harwood charges that "the failure of Congress to define "seaman" in the Jones Act, and "master or member of a crew" in the LHWCA leaves a major area of

International, Inc. v. Wilander, ___ U.S. ___, 111 S. Ct. 807 (1991); Herb's Welding v. Gray, 470 U.S. 414 (1985); Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 459 U.S. 297 (1983). These decisions delineate fully coverage criteria under the LHWCA and provide ample guidance to the maritime industry.[4]

The Fourth Circuit's holding that Harwood was engaged in "maritime

---

uncertainty in the law, an uncertainty which seriously affects the rights of this multitude of workers." Petition at—12. This charge ignores the fact that this Court has exhaustively, and recently, defined these terms.

[4]Since 1927, this Court has granted certiorari in over 55 LHWCA cases. M. Sturley, Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases, 67 Tex. L. Rev. 1251, 1274 (1989) (urging that even when there is a intercircuit conflict, "the Supreme Court could safely leave virtually every LHWCA case to the lower courts . . . ").

employment" was based on the undisputed fact that Harwood was injured on navigable waters in the course of his employment. The Fourth Circuit stated:

> It is undisputed that Harwood was injured on the "navigable waters" of the United States, so at the time of his injury, he was engaged in employment that was compensable under the pre-1972 LHWCA.

Harwood, 944 F.2d at 1190. Relying on Perini and Herb's Welding the Fourth Circuit held that since Harwood was covered under pre-1972 coverage criteria, he is covered post-1972. In other words, Harwood was engaged in "maritime employment." Harwood, 944 F.2d at 1191.

Though Harwood contends that he performed traditional seaman's work, he nonetheless denies that he was engaged in "maritime employment." Petition at 17. He argues that "maritime employment" depends on the worker's particular

function and includes only those engaged in "longshoring and ship maintenance operations." Petition at 17. Perini flatly rejected this exact argument, holding that a worker injured in the course of his employment while on navigable waters is engaged in maritime employment "without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." Perini, 459 U.S. at 311, 323-24. Harwood does not attempt to distinguish Perini. He ignores it.

After holding that Harwood was engaged in maritime employment, the Fourth Circuit held that Harwood was not a "master or member of a crew" excluded from LHWCA coverage. Harwood, 944 F.2d at 1191-92. Harwood conceded that he was not a Jones Act seaman by failing to appeal the district court's dismissal of his Jones Act count. The Fourth Circuit, however,

addressed the subject anyway and held that the district court was clearly right - Harwood lacked the requisite connection to any vessel. Harwood, 944 F.2d at 1192. The Fourth Circuit pointed out that "master or member of a crew" under the LHWCA and "seaman" under the Jones Act are equivalent terms. As a result, Harwood, who concededly was not a Jones Act seaman, could not be a "master or member of a crew." Harwood, 944 F.2d at 1191-92. This reasoning correctly equates "master or member of a crew" and "seaman." On this point, the Fourth Circuit relied on decisions of this Court, the Fifth Circuit and First Circuit, which hold that "master or member of a crew" and "seaman" are equivalent terms. Harwood, 944 F.2d at 1191-92 (citing Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946); Senko v. La Crosse Dredging Corp., 352 U.S. 370

(1957); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988); Bertrand v. Int'l Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983), cert. denied, 464 U.S. 1069 (1984); McDermott, Inc. v. Boudreaux, 679 F.2d 452 (5th Cir. 1982); Travelers Ins. Co. v. Belair, 412 F.2d 297 (1st Cir. 1969); Hardaway Contracting, Co. v. O'Keefe, 414 F.2d 657 (5th Cir. 1968)). The mutual exclusivity of the LHWCA and the Jones Act is well established. Indeed, it was first recognized by this Court in Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946).

After oral argument, this Court reinforced these decisions with McDermott International, Inc. v. Wilander, ___ U.S. ___, 111 S. Ct. 807 (1991). There, this Court reaffirmed its previous ruling in Swanson that "seaman" under the Jones Act

and "member of as crew" under the LHWCA are the same:

> "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act.
>
> * * *
>
> Whether under the Jones Act or general maritime law, seamen do not include land-based workers. . . . "master or member of a crew" restates who a "seaman" under the Jones Act is supposed to be: a sea-based maritime employee.
>
> * * *
>
> [Swanson held] that "member of a crew" under the LHWCA is the same as "seaman" under the Jones Act.

Wilander, 111 S. Ct. at 813-14, 817. The parties briefed the application of Wilander and the Fourth Circuit held that Wilander confirmed its analysis. Harwood, 944 F.2d at 1192 n.2. Under settled law, therefore, Harwood cannot be a "master or

member of a crew" because he is not a Jones Act seaman.

Wilander also established that, like "maritime employment," the status of a worker as a "master or member of a crew" or a "seaman" should be determined without reference to the worker's particular function. Wilander held that

> "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, [are defined] solely in terms of the employee's connection to a vessel in navigation. . . . It is not the employees particular job that is determinative, but the employee's connection to a vessel.

Wilander, 111 S. Ct. at 817.

This Court recently reinforced this holding in Southwest Marine, Inc. v. Gizoni, 60 U.S.L.W. at 4023. Gizoni, presented the question whether a ship repairman, (an occupation specifically enumerated in the LHWCA definition of

"employee") was a LHWCA employee as a matter of law. Gizoni, 60 U.S.L.W. 4020, 4023 (Dec. 4, 1991). Reiterating its holding in Wilander, this Court held that the question whether a worker is a "seaman" under the Jones Act is a mixed question of law and fact governed by the principles stated in Wilander. Gizoni, 60 U.S.L.W. at 4022. The mere fact that the worker functioned as a ship repairman was not alone sufficient to decide the issue as a matter of law. This Court again stated that "[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel." Gizoni, 60 U.S.L.W. at 4023 (quoting Wilander, 111 S. Ct. at 817).

These cases establish beyond doubt that "master or member of a crew" under the LHWCA and "seaman" under the Jones Act are the same. Similarly, except for workers

injured ashore and subject to the expanded coverage created by the 1972 amendments, a worker's particular function does not determine whether he is engaged in "maritime employment."

Ignoring these authorities, Harwood relies on South Chicago Coal & Dock v. Bassett, 309 U.S. 251 (1940), and Norton v. Warner, Co., 321 U.S. 565 (1944), for the proposition that "master or member of a crew" includes all "workers who perform the traditional work of seamen" or who are on the vessel "naturally and primarily to aid in navigation of the vessel." Petition at 10-11. The argument is flawed because this Court recently rejected Bassett and Norton. These cases held that the LHWCA "master or member of a crew" exclusion covered only "those employees on the vessel who are naturally and primarily on board to aid in her navigation."

Bassett, 309 U.S. at 260. In Wilander, this Court stated that the Bassett Court "seemed to be harkening back to an earlier, discarded notion of seaman status." Wilander, 111 S. Ct. at 815. Similarly, this Court observed that Norton "unfortunately . . . carried with it the outmoded aid in navigation language." Wilander, 111 S. Ct. at 816. Referring to its pre-Swanson LHWCA cases, including Bassett and Norton as "wayward case law," this Court observed that: "Diderot may very well have had the previous Supreme Court cases in mind when he wrote, 'We have made a labyrinth and got lost in it. We must find our way out.'" Wilander, 111 S. Ct. at 816 (quoting Johnson v. John F. Beasley Const. Co., 742 F.2d 1054, 1060 (7th Cir. 1984)). Yet, Harwood focuses rigidly on Bassett and Norton. His definition of "master or member of a crew"

remain confounded by the labyrinth that the Court so recently dismantled. He ignores the unanimous Wilander decision, which rejects Bassett and Norton and clarifies this issue. The Fourth Circuit holding, therefore, does not conflict with any applicable decision of this Court.

Harwood also claims that the Supreme Court should review this case to correct footnote 1 of the Fourth Circuit opinion. The footnote states that Seas Shipping v. Sieracki, 328 U.S. 85 (1946), was overruled by the 1972 amendments to the LHWCA. Petition at 17.[5] This footnote is

---

[5]Harwood's petition does not state that the Fourth Circuit's reference to Sieracki appears in a footnote. Rather, his petition charges that the Fourth Circuit "held" that Sieracki was overruled "entirely." Petition at 17. The Fourth Circuit's statement, which is correct, is in footnote 1.

Because the Fourth Circuit held that Harwood was covered by the LHWCA, its statement about Sieracki was not necessary

not part of the Fourth Circuit's holding and does not warrant review by the Supreme Court.

Harwood asks this Court to resolve alleged conflicts with legislative history

---

to the decision. Sieracki extended the warranty of seaworthiness to a longshoreman who faced seaman's hazards. Thus, under Sieracki, a longshoreman could recover compensation benefits from his employer under the LHWCA and, for the same injury, obtain a full recovery from the vessel owner for breach of the warranty of seaworthiness. The longshoreman was allowed to recover both LHWCA and seaman's remedies for the same injury. Sieracki was expressly overruled by the 1972 amendments to the LHWCA, which eliminated the warranty of seaworthiness as applied to workers covered under the LHWCA. See 33 U.S.C. § 905(b). Where Section 905(b) applies, Sieracki (and any question of its application to workers not covered by the LHWCA) is superseded by the statute. The Fourth Circuit ruled that Harwood is covered by the LHWCA. Therefore, Section 905(b) - not Sieracki - governs applicability of the warranty of seaworthiness. Accordingly, the Fourth Circuit relegated to a footnote its comment on Sieracki. This comment is not part of its holding. See generally G. Gilmore & C. Black, The Law of Admiralty 408-12, 449 (2d ed 1975).

and some district court opinions. He cites no legislative history inconsistent with the Fourth Circuit's holding. Needless to say, this vague allegation of conflicting legislative history does not warrant Supreme Court review. Similarly, Harwood's alleged conflict with district court opinions does not warrant Supreme Court review. See R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 207 (6th ed. 1986) ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or another circuit.").

Harwood also argues that the Fourth Circuit ruling is wrong because it apparently conflicts with a 1927 administrative opinion. Petition at 14-15.

See Longshoremen's Act, Opinion No. 22, 1928 A.M.C. 263 (U.S. Employees' Compensation Commission 1927). This apparent conflict does not, however, provide any basis for Supreme Court review. Indeed, the opinion was superseded in 1946 by this Court's changed interpretation of coverage under the LHWCA. See Swanson, 328 U.S. at 6-7; Wilander, 111 S. Ct. at 813-17. As this Court stated in Wilander, the 19 years between enactment of the LHWCA in 1927 and the Swanson opinion in 1946 was a period "during which the Court did not recognize the mutual exclusivity of the LHWCA and the Jones Act." Wilander, 111 S. Ct. at 814. The Court added that "Bassett was decided before Swanson, at a time when the Court viewed 'seaman' as a broader term than 'member of a crew.'" Wilander, 111 S. Ct. at 815. Indeed, consistent with

Bassett, the administrative opinion is based on the now discredited "aid in navigation" test. 1928 A.M.C. at 264 ("the pilot merely takes over for the time being some of the duties pertaining to navigation . . ."). Rather than rely on an out-dated pre-Swanson administrative opinion, the Fourth Circuit correctly relied on the post-Swanson opinions of this Court, the Fifth Circuit and First Circuit.

In any event, the administrative opinion is not helpful because it does not state the particular facts of the case. As this Court recently held, "the question who is 'a member of a crew,' and therefore who is a 'seaman,' is better characterized as a mixed question of law and fact. . . . *The inquiry into seaman status is of necessity fact-specific;* it will depend on the nature of the vessel and the employee's

precise relation to it." Wilander, 111 S. Ct. at 818 (emphasis added). The Fourth Circuit holding may not contradict the administrative opinion. That depends on the particular facts in the administrative proceedings, which are unknown. For these reasons, this Court should not review this case to resolve a potential conflict between the well founded Fourth Circuit holding here and a 1927 pre-Swanson administrative opinion.

Though Harwood's contentions present no legitimate basis for Supreme Court review and are flatly contradicted by decisions of this Court, he charges that the Fourth Circuit holding "is a clear aberration." To the contrary, each element of the Fourth Circuit's reasoning is supported by holdings of this Court and the Courts of Appeals. Indeed, this Court recently addressed these coverage issues in

Wilander. The Fourth Circuit's application here of the principles stated in Swanson, Wilander, and Perini does not conflict with authority from any other Court of Appeals. Absent any conflict among the circuits, this Court should not revisit issues so recently decided.

C. **The Fourth Circuit's Holding Was Narrow And Fact-Specific; It is Not of National Significance.**

To elevate the importance of this case, Harwood overstates the Fourth Circuit's holding. Harwood quotes the Fourth Circuit as expressly holding that "the Jones Act and LHWCA constitute the entire universe of coverage for maritime workers performing navigational duties." Petition at 7-8. This quotation was actually lifted from the dissenting opinion, and attributed to the panel majority without citation. Harwood, 944 F.2d at 1195.

Harwood argues from this that the Fourth Circuit held that "every maritime worker must inevitably" be covered by the Jones Act or LHWCA. Petition at 8.

To the contrary, the Fourth Circuit made no ruling affecting "all maritime workers." Indeed, the LHWCA expressly excludes from coverage eight categories of maritime workers. 33 U.S.C. § 902(3)(A)-(H). Similarly, officers and employees of the United States are excluded from coverage. 33 U.S.C. § 903(b). To be sure, some of these excluded workers are not Jones Act seamen. The Fourth Circuit did not address other workers or other exclusions not implicated by the facts or pleadings in this case. The Fourth Circuit held only that a harbor pilot who concededly is not a Jones Act "seaman" cannot be a "master or member of a crew"

under the LHWCA. Harwood, 944 F.2d at 1190.

Harwood finds broad implications in this holding. He asserts that "member of a crew" includes "workers who perform traditional work of seamen" (Petition at 10) or "all persons employed on board ships . . . [who] promote the purposes of the voyage" (Petition at 24). He concludes that "member of a crew" is broader than "seaman." Harwood claims that, under the Fourth Circuit holding, a "multitude of workers" heretofore considered "members of a crew" are now stripped from the excluded class and deprived their "vital" strict liability unseaworthiness remedy. Petition at 7-14. These so-called non-Jones Act "members of a crew" now face the "monumental burden of proving negligence" before recovering money from vessel owners. Petition at 13.

Because the Fourth Circuit ruling affects these multitudes, Harwood argues, this case is important and warrants review by this Court. This theory is, at best, novel and, at worst, unfounded legal conjecture not supported by this Court's decisions.

Harwood includes in his multitude, among others, "night mates, shore engineers, shore gangway watches, line handlers, and other workers who perform traditional work of seamen." Petition at 10. In fact, since 1946, courts have had no difficulty ruling that shore-based maritime workers are, like Harwood, covered by the LHWCA, whether or not they were engaged in traditional seaman's work. See, e.g. Perini, 459 U.S. at 311 n.21; Levene v. Pintail Enterprises, Inc., 943 F.2d 528 (5th Cir. 1991) (linehandler injured on a barge covered by the LHWCA); Nalco

Chemical Corp. v. Shea, 419 F.2d 572 (5th Cir. 1969) (a pilot salesman traveling to an offshore platform covered by the LHWCA); Interlake S.S. Co. v. Neilson, 338 F.2d 879 (6th Cir. 1964) (watchman covered by the LHWCA), cert. denied, 381 U.S. 934 (1965); Rex Navigation and Patrol Agency, Inc. v. Collura, 329 F. Supp. 696 (E.D.N.Y. 1971) (land-based employee sent temporarily onto vessel to act as watchman covered by the LHWCA); Ford v. Parker, 52 F. Supp. 98 (D. Md. 1943) (night watchman covered by the LHWCA). Harwood's multitude does not exist.

Harwood's expansive definition of "master or member of a crew" is based on Bassett and Norton. As discussed above, their definition of "master or member of a crew" was expressly rejected by this Court in Wilander. Harwood also cites two Fourth Circuit cases, Stephenson v. McLean

Contracting Co., 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S. Ct. 2110 (1989), and Whittington v. Sewer Const. Co., 541 F.2d 427 (4th Cir. 1976). Both cases are Jones Act cases not involving workers covered by the LHWCA. Both cases define "seaman" as a "master or member of a crew." Stephenson, 863 F.2d at 341. In this respect, they support the Fourth Circuit's analysis in Harwood.[6]

---

[6]Harwood argues that the Fourth Circuit holding in this case conflicts with Stephenson and Whittington. He claims that these cases cannot be harmonized with footnote 1 of the Harwood opinion, which states that Sieracki was overruled by the 1972 amendments to the LHWCA. This ostensible conflict, however, is more imagined than real. Even Harwood concedes that employees covered by the LHWCA are not entitled to a warranty of seaworthiness. Harwood merely begs the question by insisting that an unseaworthiness remedy exists for those outside the reach of the LHWCA. That threshold coverage question is, after all, the issue in this case. Nothing in Stephenson or Whittington addresses this question. They do not conflict with the Fourth Circuit's holding.

Moreover, Harwood's unprecedented argument that "member of a crew" under the LHWCA is broader than "seaman" under the Jones Act, if accepted, would conflict with the purpose of the LHWCA and dramatically reduce the number of workers covered by the LHWCA. As this Court held in Wilander, "[w]ith the passage in the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers." Wilander, 111 S. Ct. at 813. Congress sought to provide compensation remedies for land-based workers while preserving to sea-based

---

Even if there was a conflict, there is no basis for Supreme Court review. Davis v. United States, 417 U.S. 333, 340 (1974) ("decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.").

workers their Jones Act remedies. Wilander 111 S. Ct. at 815. This coverage distinction is accomplished through the exclusion from LHWCA coverage of "a master or member of a crew." Wilander, 111 S. Ct. at 813-14. Congress's purpose of distinguishing between land-based and sea-based maritime workers is satisfied only if "master or member of a crew" is the same as "seaman."

Harwood cites no case holding that "master or member of a crew" is broader than "seaman." This Court once considered the inverse to be true — that "seaman" was broader than "member of a crew." Bassett, 309 U.S. at 260. Thus, longshoremen, who were considered "seamen" because they "[do] seaman's work," (Sieracki, 328 U.S. at 99; see International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), but were not "members

of any crew," were entitled to LHWCA and seaman's remedies at the same time. See supra n.5. But this error was corrected in Swanson and Wilander where the Court recognized the mutual exclusivity of the Jones Act and LHWCA. 111 S. Ct. at 815.

Harwood takes a new approach. He inverts the equation by asserting that "master or member of a crew" is broader than "seaman." Thus, "workers who perform traditional work of seamen" (Petition at 10) or "all persons employed on board ships . . . [who] promote the purposes of the voyage" (Petition at 24) are "members of a crew" excluded from LHWCA coverage. If accepted, this interpretation would eviscerate the LHWCA. Under Harwood's anomalous theory, longshoremen who are land-based but do traditional work of seamen would be excluded from LHWCA coverage as members of a crew. See

Sieracki, 328 U.S. at 99. Harwood's formula ignores Congress's land-based/sea-based distinction, see Wilander, 111 S. Ct. at 817, and this Court's rejection of an occupational test for "member of a crew" or "seaman" status. Harwood's odd interpretation of the LHWCA does not deserve this Court's attention.

In sum, the Fourth Circuit's narrow holding in this case does not implicate coverage for a "multitude" of workers. This case is not of national significance.

IV. Conclusion

The Fourth Circuit holding in this case represents a sound application of well established principles of LHWCA interpretation. The Fourth Circuit's decision does not conflict with any applicable decision of this Court or with any other Court of Appeals. Though

important to the parties, the Fourth Circuit holding is not of national significance.

For these reasons, the Respondent asks this Court to deny Harwood's Petition.

Respectfully submitted,

PARTREDEREIT af. 15.5.81

By: J. E. Holloway

A. Jackson Timms
Richard T. Robol
John E. Holloway
HUNTON & WILLIAMS
1000 Crestar Bank Building
500 East Main Street
P. O. Box 3889
Norfolk, Virginia 23514-3889
804/625-5501